NOMINATION OF HERBERT EUGENE ELLINGWOOD

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

NOMINATION OF HERBERT EUGENE ELLINGWOOD TO BE CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD

APRIL 21, 1982

Printed for the use of the Committee on Governmental Affairs

U.S. GOVERNMENT PRINTING OFFICE
94-259 O WASHINGTON : 1982

5401-32

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NOMINATION OF HERBERT EUGENE ELLINGWOOD

WEDNESDAY, APRIL 21, 1982

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D.C.

The committee met at 2:04 p.m., room 3302, Dirksen Senate Office Building, Hon. William V. Roth, Jr. (chairman of the committee) presiding.

Present: Senator Roth.

OPENING STATEMENT OF SENATOR ROTH

Chairman ROTH. The committee will be in order.

This afternoon, the Committee on Governmental Affairs will consider the nomination of Herbert E. Ellingwood to be the Chairman of the Merit Systems Protection Board.

Mr. Ellingwood, I want to welcome you to our committee and express my sincere appreciation on behalf of the committee and the staff for your cooperation throughout all phases of our confirmation process.

As you may know, our committee rules require all witnesses at nomination hearings to give their testimony under oath. Would you please stand and raise your right hand?

Mr. Ellingwood, do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. ELLINGWOOD. I do.

Chairman ROTH. Please be seated.

The elimination of waste, fraud, and mismanagement has become a top priority with this administration, and particularly with this committee. The Federal worker is our best defense against illegal and wasteful activities, for it is the civil servant who most often discovers these problems. The Merit Systems Protection Board must play an integral role in upholding the standards of the Civil Service Reform Act. Civil servants who have the courage to reveal waste in Federal programs must be protected, and the law does give statutory protection to those Federal employees who disclose fraud and other illegal activities. The MSPB must insure that this law is upheld.

The task of protecting civil servants from any unfair personnel practices is a particularly difficult one, but it is critical. In these times of low employee morale in the Federal work force, it is essential that each employee can be assured of fair and equal treatment in his or her particular position.

High morale encourages more effective management of Federal resources, and morale will be tremendously enhanced as civil servants

become confident that their input toward improving their particular offices, and the Government as a whole, will be both appreciated and will promote corrective action.

Due to the great importance of this position, Mr. Ellingwood's nomination has been the subject of a careful review. In 1978, this committee adopted rule 8, which enumerates requirements which must be met on all confirmations subject to the committee's evaluation. This rule requires that the committee conduct an inquiry into the nominee's experience, qualifications, suitability, and integrity to serve in the position for which he has been nominated. This rule helps insure a thorough yet reasonable review of the nominee's background and qualifications.

I will briefly recount the steps that the committee has taken on Mr. Ellingwood's nomination prior to today's hearing. First, a detailed biographical and financial information questionnaire was submitted to Mr. Ellingwood. The committee also requested that the nominee respond to questions on policy matters in writing. Without objection, both the prehearing questions and the outline of biographical and financial information will be placed into the record, along with responses to written questions from Senator Pryor.

[The information referred to follows:]

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES[1]

A. BIOGRAPHICAL INFORMATION

Question 1. Name: (Include any former names used.)

Answer. Herbert Eugene Ellingwood.

Question 2. Address: List current residence address and mailing address.

Answer. 6607 Briar Hill Court, McLean, Virginia 22101.

Question 3. Date and Place of Birth.

Answer. March 5, 1931, Ordway, Colorado.

Question 4. Marital Status: (Include maiden name of wife or husband's name.)

Answer. Audrey Kesler Ellingwood.

Question 5. Names and ages of children.

Answer. Edwin Bruce Ellingwood—age 18; Thomas Barry Ellingwood—age 15.

Question 6. Education: List institution(s), dates attended, degree received and date degree granted.

Answer. Aromas Grammar School—1937–1945; Salinas Union High School—1945–1949; Yale University—1949–1953—B.A. degree (major: Political Science and Economics); Stanford University Law School—1957–1960—LL.B.

Question 7. Employment record: List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of inclusive employment.

Answer. Deputy District Attorney—Alameda County, California—1960–1966; also Legislative Advocate for the Law and Legislative Committees, California District Attorneys' and California Peace Officers' Associations; Legislative Representative, State Bar of California—1966–1969 (Sacramento, California); Legal Affairs Secretary to Governor Ronald Reagan—Sacramento, California—February 1, 1969 to December 31, 1974; Special Assistant Attorney General, State of California—Sacremento, California—January 1, 1975 to July 1, 1979; Private Law Practice—Firm of Caldwell and Toms—Sacramento, California—July 1979 to March 1981; Deputy Counsel to the President of the United States, The White House, Washington, D.C.—March 1981 to December 1981.

Question 8. Government Experience: List any experience in, or association with Federal, state or local governments, including any advisory, consultative, honorary or other part-time service or positions.

Answer. All my employment has been with Federal, state or local government except for the State Bar activity (1966–1969) and the private law practice (1979–1981). (See answer No. 10 for other activity.)

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[1] Financial information retained in committee files.

Question 9. Business Relationships: List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership or other business enterprise, educational, or other institution.

Answer. 1979–1981—Partner in firm of Caldwell and Toms, 611 W. 6th Street, Los Angeles, Calfiornia 90017.

Corporations

Vence Associates, Inc., 611 W. 6th Street, Los Angeles, California 90017—stockholder—1980–1981.

S. K. Sung, Inc., 3595 Almaden Road, San Jose, California 95118—Officer (stock not issued prior to resignation)—1980–1981.

Strawberries & Stuff, 1450 W. Colonial Parkway, Roseville, California 95678—officer, stockholder—1980–present.

Partnerships

Nellie Gail No. 1 Associates, 24882 Buckboard, Laguna Hills, California 92653—1980–present.

Giebel Petroleum & Investments, 1 Marienfeld Place, Midland, Texas 99701—1979–present.

Other

Shelbourne Estates Homeowners Association, 7575 Auburn—Folsom Road, Loomis, California 95650—Officer—1980–1981.

Question 10. Memberships: List all memberships and offices held in professional, fraternal, scholarly, civic charitable and other organizations.

Answer:

American Bar Association—Criminal Law Section, various committees.

Christian Legal Society—National President, 1976–1977; National Board of Directors, 1974–1975; member, 1967–present.

State Bar of California—Member, Committee on Criminal Law and Procedure, 1970–1973.

Alameda County Bar Association, 1960–1981.

Sacramento County Bar Association.

Placer County Bar Association.

California Organized Crime Control Commission, 1977–1978 (member).

Peace Officers Standards and Training Advisory Committee, member, 1980–1981.

California Peace Officers' Association—Federal Law Enforcement Assistance Act Committee; Standards and Ethics Committee.

California District Attorneys' Association—Federal Law Enforcement Assistance Act Committee.

California Sheriffs' Association, 1960–1981.

University of California, School of Criminology—Federal Law Enforcement Assistance Act Committee.

Delegate, White House Conference on Children, 1970.

Delegate, National Conference on the Judiciary, 1971.

Delegate to the National Conference on Corrections, 1971.

Delegate, National Conference on Criminal Justice, 1973.

Member, California Council on Criminal Justice, 1969–1975; Member, Riots and Disorders Task Force, 1969–1970; Chairman, Judicial Process Task Force, 1970–1974; Member, Executive Committee, 1970–1975; Chairman, Planning Allocation Committee, 1971–1974.

Member, California State Communications Advisory Board, 1970–1974.

California Commission on Peace Officer Standards and Training, Attorney General's Representative, 1975–1979.

Project Safer California, Member—Judicial Process Personnel and Institution, 1974.

Member, Advisory Board to the Joint Legislative Committee for Revision of the Penal Code (California).

California State Bar Conference on Trial and Appellate Court Reform, Participant.

Member of and Speaker at California Governor's Traffic Safety Conference, 1965.

Member of Citizens' Advisory Committee to the Joint Legislative Committee for Revision of the Penal Code.

Member of the Governmental Affairs Council, 1980.

Member, Academic Board, California Civil Disorder Management Course, California Specialized Training Institute, Camp San Luis Obispo, 1971–1974.

Member, Attorney General's Task Force on Parole and Probation, 1971–1972.

Member, Citizen Advisory Committee, Correctional System Study, Board of Corrections, 1970–1974.

Advisor, California Assembly Criminal Justice Cost Project, 1970–1971.

Advisor, California Chief Justice's Select Committee on Trial Court Delay, 1971–1972.

Editor of Digest of Legislation Affecting Criminal Law and Procedure, 1972–1976.

California Governor's Select Committee on Law Enforcement Problems, Member, Steering Committee, 1972–1973.

Instructor, Criminal Law, Chabot College, 1964.

California Christian Committee for Israel, Member, 1976–present.

Member, Advisory Board of the Institute of Continuing Studies, California State University, 1976–1981.

Vice President of Laws At Work—1979.

Regent, CBN University, Virginia Beach, Virginia, 1979–present.

Teen Challenge—Advisory Council Member, Santa Cruz, California, 1962–1981.

Monte Vista Christian High School Board of Trustees, Watsonville, California, 1960–present.

Bethany Bible College, Santa Cruz, California—College Council, Vice Chairman, 1965–1968; Chairman, 1968–1974; Development Cabinet, Chairman, 1968–1970; Member, 1975–1980.

Roseville Assembly of God Church, Roseville, California, Elder.

Member, Association of the United States Army, Mother Lode Chapter, 1970–1974.

Member, Board of Directors of the Alpha Foundation, a scientific, literary and educational corporation established to research, develop and sponsor community impact programs, 1972–1981.

Deputy District Commander of the Royal Rangers. This is a boys' group within the Assemblies of God, a religious organization; it is similar to Boy Scouts. As Deputy District Commander, I was responsible for the program in 350 churches during the 1960s.

Commonwealth Club, San Francisco, California.

Comstock Club, Sacramento, California.

California Junior Statesmen of America Foundation; at various times, I was Trustee, Secretary, and a Vice President; I was Chairman of the Summer School in 1965, 1966, 1967.

California State Department of Education, Advisory Committee on Guidelines for Moral Instruction in California Schools.

Sunrise Christian Schools, Roseville, California, Member Board of Trustees, 1976–1981.

Question 11. Political Affiliations and Activities: List all offices with a political party of any public office for which you have been a candidate. List all memberships and offices held in or financial contributions and services rendered to all political parties or election committees during the last 10 years.

Answer. Registered Republican; Precinct Captain, Alameda County, California, 1960–1966; Placer County Republican Central Committee, member, 1977–1981; Chairman, 1979–1980; California Republican State Central Committee, 1977–1981; Alternate Delegate, National Republican Convention, 1976; Delegate at Large, National Republican Convention, 1980; Small financial contributions have been made to each of the above organizations and to various candidates, partisan and non-partisan, over the last 10 years. During the last election, I supported Congressman Gene Chappie and President Reagan.

Question 12. Honors and Awards: List all scholarships, fellowships, honorary degrees, honorary society memberships, and any other special recognitions for outstanding service or achievements.

Scholarships

Yale University; B.P.O.E.; Sears-Roebuck.

Special Recognition

California Scholarship Federation; California Peace Officers' Association; California State Sheriffs' Association; California District Attorneys' Association; Peace Officers Research Association of California; Oakland California Police Department; Alameda County, California; Port of Oakland; California Junior Chamber of Commerce; Laws At Work; Los Angeles Board of Supervisors; Los Angeles City Council; Christian Legal Society; Religious Heritage of America;

Association of Christian Schools International; Office of the California Attorney General; California Legislature.

Question 13. Published Writings: List titles, publishers and dates of books, articles, reports or other published materials you have written.

Answer. Editor, Digest of Legislation Affecting Criminal Law and Procedure, 1972–1976.

Article: Ronald Reagan, "God, Home and Country"—Christian Life Magazine, November 1980.

Article: New Wine Magazine—"Not Guilty," October 1976; "Crime Hurts," May 1977.

Question 14. Speeches: Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years which you have written copies of and which are on topics relevant to the position for which you have been nominated.

Answer. None.

Question 15. Selection: a. Do you know why you were chosen for this nomination by the President?

b. What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

Answer. a. I was his Legal Affairs Secretary from 1969–1974 and his Deputy Counsel during 1981. I assume he has confidence in me.

b. I have over 20 years of legal experience, almost all of which has been in government. In private practice, I did some personnel law.

C. FUTURE EMPLOYMENT RELATIONSHIPS

Question 1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?

Answer. I have severed all business connections already with the exception of (1) Strawberries & Stuff, which is a Subchapter S Corporation, owned by my immediate family; it was established to be an import/export business; some importing was done prior to my Federal employment. (2) The oil investment with Giebel Petroleum is a limited partnership solely for investment. (3) The Nellie Gail #1 Associates was for the building and sale of a house which has been accomplished. Less than $6,000 is owed to me by the purchaser.

Question 2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.

Answer. I have no plans to pursue outside employment during Federal service except: (1) Strawberries & Stuff sales and consulting mainly in the area of arts and crafts; and (2) lectures, mainly religious, not associated with government, for which sometimes I receive reimbursement of expenses or honoraria.

Question 3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization?

Answer. No.

Question 4. Has anybody made a commitment to employ your services in any capacity after you leave government service?

Answer. No.

Question 5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?

Answer. Yes.

D. POTENTIAL CONFLICTS OF INTEREST

Question 1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients or customers.

Answer. My former law firm is paying off a note with Crocker Bank which was a loan to purchase the partnership. (See attached letter from Caldwell & Toms dated October 20, 1981.)[1]

Question 2. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.

Answer. None.

Question 3. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a

[1] The letter referred to may be found in the committee files.

client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

Answer. None.

Question 4. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy.

Answer. I have worked on legislation during my entire career until I entered Federal service. I represented the California District Attorneys' Association, the California Peace Officers' Association, the California State Sheriffs' Association, the State Bar of California, Governor Ronald Reagan and California Attorney General Evelle Younger. In private practice I never testified, but did advise clients on their testimony before the California Legislature, but nothing before the Congress.

My former law firm had clients with issues before Federal regulatory agencies. I never made an appearance on any of these cases, but did a lot of work on Pat Boone's Acne-Statin case which was in the Federal Trade Commission. We retained Santarelli and Gimer, 2033 M Street, N.W., Suite 700, Washington, D.C. 20036, for that purpose. I have had no contact with that Commission since entering Federal service.

While Deputy Counsel to the President, I did staff work on various legislative proposals, mostly involving criminal law. This did not involve any appearance before a legislative committee.

Question 5. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements.)

Answer. I will withdraw from any conflict of interest.

Question 6. Do you agree to have written opinions provided to the Committee by the General Counsel of the agency to which you are nominated and by the Attorney General's office concerning potential conflicts of interest or any other legal barriers to your serving in this position?

Answer. Yes.

E. LEGAL MATTERS

Question 1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.

Answer. No.

Question 2. Have you ever been investigated, arrested, or charged or held by any federal, state or other law enforcement authority for violation of any federal, state, county or municipal law, regulation or ordinance, other than a minor traffic offense? If so, provide details.

Answer. No.

Question 3. Have you or any business of which you are or were an officer ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.

Answer. None, except as counsel.

Question 4. Have you ever been convicted (including pleas of guilty or nolo contendere) of any criminal violation other than a minor traffic offense?

Answer. No.

Question 5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

Answer. None.

AFFIDAVIT

I, Herbert Eugene Ellingwood, do swear that the information provided in this statement is, to be best of my knowledge, true and accurate.

Date: March 18, 1982. HERBERT E. ELLINGWOOD.

Subscribed and Sworn to before me this 18th day of March, 1982.

ROBERT S. TAYLOR,
Notary Public, District of Columbia.

My Commission Expires April 14, 1986.

Responses to Prehearing Questions

I. NOMINATION PROCESS AND POTENTIAL CONFLICTS

Question 1. Is there any issue currently under consideration by the Merit Systems Protection Board from which you may have to disqualify yourself? If so, please explain.

Answer. No.

Question 2. How were you selected to be nominated to serve as the Chairman of the Merit Systems Protection Board? Were any conditions expressed or implied, attached to your nomination?

Answer. I was Deputy Counsel to the President. No reasons were given for my selection and no conditions were attached.

Question 3. Have you made any specific commitments with respect to the basic policies and philosophy you will seek to implement as the Chairman of the MSPB? If so, please describe these commitments.

Answer. My only commitment was to the President—that I would operate the Board on a strictly professional basis and ensure the impartial forum which the law envisions. I have made no other commitments, nor have I been asked for any.

Question 4. Why did you take this appointment to be Chairman of the Merit Systems Protection Board?

Answer. Government today is undergoing major changes as we are faced with diminishing resources. This, of course, means that the institutions we have known must make adjustments to continue to meet their statutory responsibilities. The real challenge is to ensure that any changes be made fairly and impartially. I recognized that this Board is the institution responsible for ensuring such fairness in employer/employee relationships. I embraced the opportunity to be a part of that process.

Question 5. Why do you feel that you are particularly well qualified to serve in this position?

Answer. I feel that more than 20 years in the practice of law, mostly in the government, provides me with the necessary experience. Additionally, I believe that I can bring to the Board a fresh insight to its challenges.

II. THE MERIT SYSTEMS PROTECTION BOARD

Question 1. What is the role of the Merit Systems Protection Board?

Answer. I consider the Board's primary role to be one of maintaining, through its authority under the CSRA, the integrity of the Federal personnel system by balancing the objectives of management with statutory protections provided to the employees who accomplish those objectives. It must, at the same time, ensure fairness and encourage efficiency in the Federal work force.

Question 2. What are the MSPB's most important functions?

Answer. Simply put, I believe the Board's most important functions are to:

a. Protect the due process rights of employees and ensure that they are not subjected to prohibited personnel practices;

b. Provide the agencies with the necessary flexibility to discipline and/or remove employees who do not perform their jobs;

c. Guarantee both employees and agencies that appeals will be processed in an expeditious and impartial manner; and

d. Play an active role in protecting merit systems and merit principles from political and administrative abuse.

Question 3. What do you feel are the most important functions of the position to which you have been nominated?

Answer. The Chairmanship of the Board demands two major qualifications: First, as in most agencies, the ability to provide effective leadership is required. Equally important however, is the ability to produce a high quality of legal work which is essential in maintaining the integrity of the Board as an impartial adjudicatory body.

Question 4. How do you see the relationship between the MSPB and (a) the Office of Personnel Management; (b) the Federal Labor Relations Authority and; (c) the Office of Special Counsel of MSPB?

Answer. a. It is important to recognize the distinctly different roles in the CSRA assigned to the Board and OPM. OPM is responsible for advising and assisting the President in the development of Federal personnel management

policies and practices and for providing personnel management leadership to all Federal agencies. In contrast, the Board is an independent agency that is responsible for adjudicating cases arising under OPM policies and procedures, as well as other provisions of the Act. Furthermore, the Board conducts studies of the merit systems, examines significant OPM activities, and reviews the legality of OPM rules and regulations.

Because of these distinctly different roles, it is essential that the two perform our respective roles and duties in an autonomous fashion. However, the impact of each on the other cannot be ignored. It is imperative that the channels of communication be maintained without sacrificing the necessary autonomy, and with a recognition of the differing statutory assignments which we have.

b. While the Federal Labor Relations Authority's functions are somewhat distinct from the Board's own responsibilities, a cooperative relationship needs to be maintained so that in situations where duties may overlap (such as allegations of prohibited personnel practices heard by the Board which also contain allegations of unfair labor practices normally considered by the FLRA) confusion to our constituents is minimized.

c. The legislative history of the CSRA reveals Congress' intention to include the Office of Special Counsel as part of the Board but for the Special Counsel to perform investigative and prosecutorial duties in an independent manner.

The Act assigned differing responsibilities to the Board and the Special Counsel because of their respective adjudicatory and prosecutorial roles. This requires that in substantive areas an arms-length relationship be preserved. However, other areas such as administration and personnel management offer opportunities for mutual efforts without compromising the Special Counsel's functional autonomy which must be preserved.

Question 5. How do you see the relationship and responsibilities of the MSPB to (a) the President (b) the Congress and (c) the executive agencies?

Answer. a. I believe that the Board's relationship with the President should be one of cooperation in working to achieve a civil service system which is governed by merit principles and is responsive to the needs of the American people. President Reagan has been fully supportive of our needs in accomplishing this goal.

b. Congress gave the Board its mandate, and in the fulfillment of our duties we share common goals with the Congress: protecting the merit system from political abuses, maintaining faith and confidence in the civil service system, and ensuring the effective operation of the merit principles in practice. It is our duty to work with the Congress in any way in which we can, consonant with these basic principles, to achieve these goals.

c. As the Board processes appeals from Federal agencies promptly and fairly, we are meeting our obligation to those agencies. This allows Federal managers to improve the productivity and efficiency of the Federal work force while safeguarding the legitimate rights of employees, as the law envisions. At the same time, however, the Board expects other agencies to cooperate in following the Board's procedures, including the meeting of all time deadlines required for the expeditious handling of appeals and other actions. Congress gave the Board appropriate enforcement powers, which we have and will continue to exercise, as circumstances require. These include the use of subpoenas to develop necessary evidence, the issuance of stays to bar prohibited personnel practices, and the firm enforcement of Board orders.

Question 6. How has the caseload of the MSPB been affected by the recent reductions in force? Do you anticipate a need for additional staff in the near future?

Answer. The impact of RIF appeals on the Board's caseload is best illustrated by the attachment I have provided. The Board anticipates hiring a significant number of new staff, particularly in our regional offices to handle this increase in RIF appeals as well as the huge influx of appeals by former air traffic controllers. Of course, the hiring is contingent upon the enactment of the Board's fiscal year 1982 supplemental request now pending before the House in H.R. 5922. After the disposition of these cases the Board hopes to handle normal increases without hiring additional staff.

WORKLOAD COMPARISON FIGURES

	Apr. 18, 1981	Apr. 17, 1982
Cases pending as of:		
Reductions In force:		
Nationwide	92	1,166
District of Columbia Region	10	395
Air traffic controller appeals:		
Nationwide	0	10,874
District of Columbia Region	0	291
All other appeals:		
Nationwide	1,533	1,855
District of Columbia Region	168	170
Total appeals:		
Nationwide	1,625	13,895
District of Columbia Region	178	856

Question 7. It has been discussed that the MSPB takes more time than necessary on many of its cases. Do you have any ideas on how the turnover time on cases could be improved?

Answer. Let me preface this response by noting a very important distinction which must be made. Appeals are first filed in our 11 regional offices around the country. After an opportunity for appropriate hearings, initial decisions are issued which, if not appealed to the full Board in Washington, D.C., or not reopened by the Board on its own motion, become the final decisions of the Board. I am pleased to report that we have succeeded in meeting a self-imposed deadline of 120 days—from filing to decision—in 98 percent of all cases filed, a vast improvement over the years of delay which often characterized the old Civil Service Commission.

Where the Board has seen delays has more often been in those cases appealed to the Board itself from regional office decisions. In the Board's first 3 years there have been many complex and difficult legal issues which had to be decided—cases of first impression which have had important precedential value. These cases, by their nature, took much longer than most, and often other cases which would turn on the issues decided in these lead decisions were held up as a result.

Further, the sheer numbers of these cases have impeded our efforts to deal with them as promptly as we would like. For nearly one-half of the Board's 3 year existence there have been only 2 Board members. At the same time the size of our staff has diminished because of our severe budget situation and we have been unable to replace many of them.

This is not to say that there is not room for improvement. One of my first acts as Chairman was to initiate efforts to streamline the procedures I found in place, with a view toward further decreasing the processing time without diminishing the fairness of the system. I believe we are making headway.

III. THE CIVIL SERVICE REFORM ACT

Question 1. What do you feel are the most important principles of the Civil Service Reform Act?

Answer. I believe the most important principles of the Civil Service Reform Act are the ones which promote fairness, efficiency of the workforce and an increased ability to manage effectively. Without these principles the objectives of a productive work force and an improved quality of public service cannot be attained.

Question 2. Do you feel that the Civil Service Reform Act offers too much, too little, or the appropriate amount of protection for the Federal employee?

Answer. I believe the Civil Service Reform Act is a sound platform from which it is reasonable to expect that fair treatment and adequate protection can be provided to federal employees so long as its provisions are properly administered. I believe that further refinements can be made which would benefit employees' management and productivity.

Question 3. As you know, MSPB has recently completed a study which showed that a high percentage of the Federal employees surveyed have seen cases of retaliation against whistleblowers. In light of this report, do you feel that the Civil Service Reform Act has effectively protected "whistleblowers" from retaliatory action?

Answer. As you know, the Board can deal with whistleblower cases only when they are brought before it, since the whistleblower protections initially fall within the ambit of the Special Counsel. I do believe, however, that the CSRA created useful mechanisms to deal with the problem. But, as the Deputy Special Counsel recently noted in testimony before the House Appropriations Committee, more than half the potentially affected Federal employees simply don't know about the Special Counsel. The Special Counsel is a Member of the President's Council on Integrity and Efficiency, and he has told me that this Council is giving a significant amount of attention to this problem. It is also essential that other agency heads heighten the awareness among employees of their agencies' reporting channels, how they work, and their rights under the law. I believe the key is the spirit and attitude set at the top.

Question 4. There has recently been discussion of the politicization of the Senior Executive Service. Do you believe that those in the SES are properly protected under the Civil Service Reform Act?

Answer. Recent studies in this area by the Board's Office of Merit Systems Review and Studies and the General Accounting Office have not shown significant evidence that political manipulation has taken place in the Senior Executive Service. From an adjudicatory standpoint, only one member of the SES has appealed to the Board under the protections which were provided by the Civil Service Reform Act more than 3 years ago. In that instance, the Board determined that sufficient evidence had not been presented which would warrant the Board's staying the removal sought. Therefore, I believe it is fair to conclude that proper protections for those Federal employees in the SES do exist.

Question 5. Do you feel that any particular changes in the Act would be helpful toward carrying out the goals of the legislation?

Answer. The Board is now conducting a comprehensive analysis from which we hope may come some recommendations for legislative changes which could enhance the effectiveness of the Act. We will, of course, provide the Committee with those recommendations.

IV. RELATIONS WITH CONGRESS

Question 1. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted Committee of the Congress if you are confirmed?

Answer. Yes.

RESPONSES TO WRITTEN QUESTIONS SUBMITTED BY SENATOR PRYOR

Question 1. You have served as Legal Affairs Secretary to former Governor Reagan and most recently as Deputy Counsel to the President in the Reagan White House. The Merit Systems Protection Board was created by the Civil Service Reform Act of 1978 as an independent, quasi-judicial agency with responsibility for enforcing merit principles throughout the federal government. How do you view the relationship between the MSPB and the President particularly in light of your previous working relations with the President?

Answer. I fully recognize that the legislative history makes it clear that Congress intended the Board to function in an independent manner to protect the merit systems. I also believe that the Congress succeeded in creating a structure for the Board which insulates it from inappropriate outside influences. At the same time, I believe we can work with President Reagan and his appointees to further a civil service system governed by merit principles.

From a personal standpoint my relationship with the President has not had, nor do I anticipate it having, any adverse effect on my performance as Board Chairman.

Question 2. Would you please summarize the major actions which you have taken as the acting Chairman of the MSPB since your appointment in December 1981?

Answer. I have believed from the outset that for the Board to maintain its credibility among civil servants, it must demonstrate a record of adjudicating appeals in a timely fashion while still guaranteeing consistent fairness in the process. To ensure such a system, I immediately directed a series of reviews of

the Board's appeals process in order to determine how it might be streamlined. I believe the results of these studies will produce a variety of changes which, if implemented, will significantly simplify the present system. Naturally, I will be happy to furnish the Committee with our recommendations as these studies are completed.

In addition, I have devoted considerable time and energy to familiarizing the Congress and the Administration with the Board's severe budget needs. Even before I was appointed as Board Chairman, the Board was operating under budget conditions which were at best uncertain. Since that time, the situation has become critical—though we are hopeful that supplemental funding is imminent. Because it was obvious to me that the Board could not perform its mission if its fiscal needs were not met, I tried to do what I could to improve the Board's chances of obtaining adequate funding.

Question 3. Please explain what your major priorities are for providing for the effective administration of the Merit Systems Protection Board?

Answer. The two major priorities I have established relate to improved professionalism and morale of Board employees.

I believe the Board's credibility depends mainly on the degree of professionalism associated with its work product. While this may be a laudable goal at any agency, the quasi-adjudicatory nature of the Board's functions demands it. Therefore, I have insisted from the outset that all employees exhibit a level of professionalism which corresponds to their assigned duties.

At the same time, I am sensitive to the extreme importance of good morale in a successful organization. Therefore, I have attempted to foster an atmosphere among Board employees which promotes the common goal of operating a successful organization.

Question 4. The relationship between the MSPB and the Office of Special Counsel has been the source of some controversy in the past. How do you view this relationship and what steps have you taken to achieve a higher level of cooperation between the MSPB and the Office of Special Counsel?

Answer. Congress intended the Office of the Special Counsel to be a part of the Merit Systems Protection Board but to perform its investigative and prosecutorial duties in a strictly autonomous manner. I intend to strive to preserve that autonomy. At the same time, however, I believe that the friction that once existed between the Board and the Special Counsel was unnecessary and counterproductive. Opportunities exist in which a good working relationship in areas such as administration and personnel management can yield benefits to both entities. Toward that end, Special Counsel Kozinski and I have been meeting weekly in an effort to maintain and improve such a relationship. We now enjoy a cooperative, yet arms-length, relationship.

Question 5. In your pre-hearing questions you were asked to discuss the functions of the Merit Systems Protection Board. You responded that one major function of the Board is to "provide the agencies with the necessary flexibility to discipline and/or remove employees who do not perform their jobs." Would you please elaborate on this particular point?

Answer. One of the goals of the Civil Service Reform Act was to enable management to manage effectively but in a manner consistent with merit system principles and free from prohibited personnel practices. In this regard, I view the Board's role as an impartial adjudicator charged with the duty of protecting both interests. While I noted that these are two of the four most important functions of the Board, they should not be viewed independently of each other. The interrelationship of the two was carefully crafted in the Act, and both are vitally important to the successful implementation of the Act.

Chairman ROTH. According to committee procedure, Mr. Ellingwood's net worth statement and listing of sources of income for prior years will not be made a part of the committee record but are available at the committee office for inspection by the public.

Senator Eagleton, as the ranking minority member of the committee, and I, as chairman, both examined a summary of the investigation performed by the FBI. An evaluation by the Office of Government Ethics was reviewed, and Mr. Ellingwood was interviewed by designated staff members. Finally, a report was prepared for the committee members containing all relevant information concerning Mr.

Ellingwood's qualifications for the position to which he has been nominated.

I would say for the press that all materials which are placed in the record pursuant to unanimous consent requests are available for your inspection at the committee office at any time, including today.

Senator Stevens has a statement which he would like to submit for the record and it will be inserted into the record at this point.

[The statement referred to follows:]

OPENING STATEMENT OF SENATOR STEVENS

Mr. Chairman, I am very pleased to support the nomination of Herbert Ellingwood for the chairmanship of the Merit Systems Protection Board. The merit board was established pursuant to the Civil Service Reform Act. Its responsibility is to protect the rights of Federal employees and to adjudicate their cases against the Federal Government.

Quite frankly, Mr. Ellingwood's predecessors were somewhat irresponsible in their relationship to Congress. My hope is that he will establish close ties with the respective oversight committees in both Houses. I am pleased to point out Mr. Ellingwood has already shown an admirable tendency to work with Congress, rather than trying to confront us.

This is a difficult period for the Federal workforce. The workforce is being reduced, while the government's size is being constricted. It is imperative for the Board to uphold the merit principles of the Civil Service so that cries of political manipulation of the Federal workforce will be unfounded.

I thank him for his willingness to serve in this position, and I wish him the best of luck.

Chairman ROTH. Mr. Ellingwood, would you like to make any opening statement before answering my questions?

TESTIMONY OF HERBERT EUGENE ELLINGWORTH, NOMINEE, TO BE CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD

Mr. ELLINGWOOD. It is a pleasure to be before you, Mr. Chairman. I think that the Board has proven its worth in the past. It is a pleasure for me to be a part of it. This, obviously, is an important time for the MSPB as we look at the strains upon Government and the various economic difficulties, and our 11 regional offices around the United States stand ready to do what we can.

It seems like we are trying to do more with less. That seems to be the mission of most of us. I think it is going to be a good tour of duty.

Chairman ROTH. Mr. Ellingwood, is there anything that you are aware of in your background which might present a conflict of interest with the duties of your office?

Mr. ELLINGWOOD. No.

Chairman ROTH. Do you know of any reason, personal or otherwise, which would in any way prevent you from fully and honorably discharging your responsibilities of the Chairman of the Merit Systems Protection Board?

Mr. ELLINGWOOD. I do not.

Chairman ROTH. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

Mr. ELLINGWOOD. I do.

Chairman ROTH. I understand that MSPB's budget has been cut quite severely. Their case load has increased more than threefold over

the past year. How do you plan to deal with such an overload in the work load?

Mr. ELLINGWOOD. We have a request, supplemental request, which the House committee has approved and is currently before the House for approval. In all of our contacts in both the House of Representatives and the Senate, no Member of the Congress has yet disagreed that that supplemental request is deserved. It is a substantial request considering the size of our budget.

Also, the White House and OMB have both signed off on that particular request, so we are waiting for action by the Congress on the supplemental appropriation. Once we have that, we will have the opportunity to hire additional people to work on the additional cases.

Meanwhile, we have also set up about 12 various studies to try to streamline the current procedures to allow quicker response by our agency to requests that are before us by both the employees and the agency. Some of those are almost at the completion point; some are longer term, including alternative methodologies of solving the problems other than the adjudicatory model. So I think we are proceeding on both fronts.

Chairman ROTH. Thank you, Mr. Ellingwood.

The committee will be taking action on your nomination as soon as possible. As I said, I think you are assuming an extraordinarily important position, and I wish you well.

Mr. ELLINGWOOD. Thank you, Senator.

Chairman ROTH. The committee is in recess.

[Whereupon, at 2:08 p.m., the committee recessed subject to the call of the Chair.]

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